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THE DEVELOPMENT OF SET-OFF.

Although the law, through frequent statements by its oracles, may be said in theory at least, to be fairly committed to the principle that circuity of action is undesirable, the history of set-off and counter-claim displays how tedious, as well as devious, are the processes that transmute counsels of perfection into rules of conduct.

The curious analogy, so often noted in the development of English and Roman procedure, is particularly striking in the tardy acceptance by both systems of the common sense view that a man should not be compelled to pay one moment what he will be entitled to recover back the next. *Compensatio* is the name given by the Roman law to the cancelling of cross demands.¹ While there are many disputed points in the history of the doctrine,² it is clear that as late as the time of Gaius,³ the golden age of the empire, it was limited in practice to claims growing out of the same transaction (*ex eadem causa*), was not permitted as of course in actions *stricti juris*, but belonged pri-

¹ Digest, XVI, 2, 1.

² Sohm's Institutes (3d Ed.) 441; E. Stampe, *Das Compensationsverfahren im Vorjustinianischen Stricti Juris Judicium*; Dernberg, *Geschichte und Theorie der Compensation*.

³ Institutes of Gains, 4, Secs. 61-68.

marily to praetorian actions *bonae fidei*. There the *judex* could by virtue of the equitable nature of his commission set off, in his discretion, a debt due by the plaintiff to the defendant growing out of the same affair as the plaintiff's claim. In the case of the banker (*argentarius*) a stricter rule prevailed. He could sue only for the balance of his account, at the peril of losing the whole if overstated. So, too, the position of the purchaser of an insolvent's estate (*bonorum emptor*) was exceptional. In suing a debtor of the insolvent he was obliged to allow (*deductio*) what was due from the insolvent to the defendant and between the *compensatio* of the banker and this *deductio* there was this difference, the former was confined to claims of the same nature while the latter was not so limited nor was it confined to debts then due.

In further development of the right, *compensatio* came to be allowed in actions *stricti juris* when, and only when, an *exceptio doli* was introduced into the formula based on this ground, but the effect, it would appear, was at first too far-reaching, since if the defendant succeeded in proving the counterclaim the *judex* was bound to absolve him altogether.⁴ The rescript of Marcus Aurelius provided generally that an *exceptio doli* on the ground of *compensatio* should thenceforth in actions *stricti juris*, if made good, operate as an off-set *pro tanto*. And, as actions *stricti juris* were based on unilateral obligations, it is clear that thenceforth *compensatio* was permissible whether arising *ex dispari causa* or *ex eadem causa*. Finally Justinian's Constitution extended the doctrine so as to include "actions real, personal or of any other kind with the single exception of the action of deposit."⁵

A point of difficulty was the effect to be given to the words "*actiones ipso jure minuant*" in Justinian's legislation. If one who was debtor to another became his creditor in a sum susceptible of compensation, were the respective debts from thenceforth extinguished by mere operation of law, or was some further act necessary to accomplish this result, such as an agree-

⁴ Girard (4th Ed.) 705; Salkowski's Roman Law, 703.

⁵ Institutes IV, 6, 30. Code 4, 31, 14.

ment by the parties or the judgment of a court? The answer to this question has a practical bearing upon various problems connected with set-off such as the Statute of Limitations, the running of interest and the appropriation of payments on open account. While commentators differ, modern authority is not inclined to regard the Roman texts as establishing the principle of automatic legal extinction of the original claim, although conceding that judicial compensation was, in its effect, to be regarded as relating back to the time when the two claims first co-existed.⁶ But at one time the opposite view had strong support and the powerful influence of Cujas caused it to prevail in France⁷ where, in the words of the present code, compensation takes place of right by force of law even without the knowledge of the debtors; the two debts are reciprocally extinguished from the moment they exist at the same time, to the extent of the respective amounts thereof.⁸ The Court of Sessions of Scotland, on the other hand, in 1738, in *Maxwell v. Creditors of M'Culloch*,⁹ adopted the principle of judicial compensation, contrary to the opinion of Lord Stair, thereby leaving it "optional to the party to propone it or not" or, in case of more debts than one, "to propone it upon one or the other debt." But when compensation was applied it was, upon equitable principles, given "an operation retro to stop the course of annual rent."

Where the Roman law was not received, as in England and in those parts of France where customary law prevailed, the doctrine of compensation did not exist. It was introduced more readily in some of the French jurisdictions than in England. For example, set-off of liquidated debts was allowed at the Chatelet of Paris in the fourteenth century.¹⁰ On the other hand,

⁶ Sohn Inst. (3d Ed.) 446. Moyles Note to Inst. IV, 6, 30.

⁷ Brissand, Hist. French Private Law (Amer. Law. School Ed.) 558 note. See also Pothier on Obligations III, 4, 3.

⁸ French Civil Code, Art. 1290. See Baudry-Lacantinerie (10th Ed.), Vol. 3, 362. Compare the German Civil Code which in article 388 provides "Compensation takes place by notice to the other party. The notice is of no effect, if it is given with a condition or a determination of time."

⁹ 5 Mor. 2550 (1738). The doctrine of compensation was not recognized at first in Scotland, *Queen v. Bishop of Aberdeen*, 5 Mor. 2545 (1543), but was introduced by the Act of 1592, Chap. 143. Erskine (25th Ed.) 514.

¹⁰ Brissand, 558 note.

there were French districts that stubbornly adhered to the older law; and in England, where customary law was doubly strong as the law of the realm, resistance to a doctrine so foreign to the spirit of a formalistic procedure was to be expected. Nor does it require much imagination to understand why the principle made so little progress. The forms of action and the system of pleading were designed to bring the opposing parties to one single and certain issue, affirmed on the one side and denied on the other. To inject a collateral question by which the case might be blown off by a side wind, as the phrase was, would have seemed intolerable. Even as late as 1815 a court of last resort in one of our states will be found declaring it "much better to leave the parties to their mutual remedies than to introduce such a principle and practice".¹¹ Nor, again, was it to be expected that there would be any appreciable social pressure upon the law for a modification of this view so long as the unilateral contract was the dominant type of obligation, the form in which he who thought about the law at all visualized his conception of a normal contract. So it was in Rome while the Praetorian actions *bonae fidei* gradually developed, so in England during the slow growth of *assumpsit*. Commerce found in these neoteric remedies the medium for translating its newly developed norms into principles of substantive law while professedly adhering to traditional concepts. Only when the significance of the bilateral obligation was understood would the two-sidedness of mercantile relations be felt with sufficient distinctness to form the basis for a juristic departure, the practice of setting off divergent claims arising out of the same transaction. And that principle accepted and its convenience demonstrated, the next step should be its extension to claims growing out of independent transactions.

At common law some of the more obvious instances of mutual conflicting demands were redressed by means of the existing procedure. Thus the action of account within its very narrow limits provided such a remedy by means of the audit;¹²

¹¹ McLean v. McLean, 1 Conn. 697 (1815).

¹² Co. Litt. 172a, 1 Bac. Abr. Accompt. (A); 1 Comyn's Dig. Accompt. (A) 1; Thuron v. Paul, 6 Whart. 615 (Pa. 1844).

a remedy supplemented by the bill in equity, for an account,¹³ and the extension of assumpsit into the field of account.¹⁴ There was also recognized as early as the fourteenth century in certain actions, especially the assize of novel disseisin, a right called *recoupment*. But the term had a narrower signification than in modern law, as will appear from an examination of the decisions, many of which are collected in *Coulter's Case*¹⁵ and Viner's Abridgment. Thus, where W leased to G for life and afterwards disseised G, who brought an assize of novel disseisin against W, it was held that the rent accruing during the disseisin should be recouped from the damages but not that which accrued before the disseisin.¹⁶ The word seems to imply no more than a right to have payments or other analogous facts shown in deduction or mitigation of damages as a means of arriving at actual damages and not the broad principle applied in modern actions of contract, where the defendant is permitted to recoup damages from the plaintiff because he has not complied with some duty or obligation imposed upon him by the terms of the contract upon which he sues.¹⁷ No trace of this latter doctrine is to be found until about the beginning of the nineteenth century, when it is first applied on grounds analogous to failure of consideration,¹⁸ and the caution with which it was first accepted and slowly

¹³ Langdell's Equity Jurisdiction 107; 1 Story's Equity Jurisprudence (13th Ed.), 443 *et seq.*

¹⁴ Arris v. Stukely, 2 Mod. 260 (1678); Dale v. Sollet, 4 Burr, 2133 (1767); Tomkins v. Willshear, 5 Taunt. 431 (1814). Hence where the transaction necessarily constituted an account the balance only was considered the debt. Green v. Farmer, 4 Burr. 2221 (1768).

¹⁵ 5 Co. 30 (1598); Viner's Abridgment, Discount (A). See also note to Incely v. Grew, 6 Nev. & M. 469 (1836).

¹⁶ Y. B. 9 Edw. III, 8, pl. 21. See also 8 Ass. 20, pl. 37; 12 Ass. 35, pl. 20; Y. B. 24 Edw. III, 49, pl. 35; Y. B. 22 Edw. IV, 25; Dyer 2b; Fitzherbert Abr., Damage, pl. 18; Brooke Abr., Damage, pl. 7; Whitehall v. Squire, Carth. 103 (1690); Carey v. Guillo, 105 Mass. 18 (1870); Edgemoor I. Co. v. Brown, 6 Pennyw. 10 (Del. 1906).

¹⁷ Farnsworth v. Garrard, 1 Camp. 38 (1807); Basten v. Butter, 7 East 479 (1806); Heck v. Shener, 4 S. & R. 249 (Pa. 1818); McAllister v. Reab, 4 Wend. 483 (N. Y. 1830); Affirmed 8 Wend. 110 (1831); Epperley v. Bailey, 3 Ind. 72 (1852); Stow v. Yarwood, 14 Ill. 426 (1853); Ward v. Fellers, 3 Mich. 281 (1854); Carey v. Guillo, 105 Mass. 18 (1870); Davenport v. Hubbard, 46 Vt. 200 (1873); Lawton v. Ricketts, 104 Ala. 435 (1893); Edgemoor I. Co. v. Brown H. M. Co., 6 Pennyw. 10 (Del. 1906).

¹⁸ See 9 AMER. LAW. REG. 321 (1861); 7 AMER. L. REV. 389 (1873); Waterman on Set-Off, 465.

extended shows how tenaciously the common lawyer will adhere to a theory, in this case the theory of independent covenants, at the expense of convenience.

Set-off, however, in the sense of cancelling mutual independent cross-demands was apparently regarded as out of question at law¹⁹ when in 1677 it was said bluntly in *Sir William Darcy's Case*:²⁰

"That if A oweth B £100 by recognizance, and B oweth A £50 or £10 upon any security whatever, and A sues B, that B cannot compel A to pay himself by way of retainer out of what is due him, but they must take their mutual remedies, unless there were any agreement to the contrary."

But the plain statement of a rule is often the first sign that it is questioned and the time was at hand when the quoted dictum would not be regarded as fundamental. There were several contributing reasons. In the first place, when the tenure of judicial office was made secure and a fixed salary took the place of fees, the courts and their official staffs were no longer personally interested in a multiplicity of suits. Then, during the troubled years of rebellion and revolution, the leading men of both parties spent considerable time in exile, came in contact with continental ideas and intellectually under the influence of that school of jurists whose theories of natural justice were then predominant, giving an impetus to the growth of equity, which is the keynote of such law reform as was accomplished in the eighteenth century. Again, with the expansion of commerce, business relations became less localized, less intimate; credit more widely extended and assets, unhappily, more easily hidden from legal process. The solid trader, sued and compelled to pay a customer in doubtful circumstances, without power to present his own bill as an offset, could take little comfort in the thought of his technical right to obtain a judgment that would probably be barren of results. Equitable relief, legislation; both, in fact, were inevitable.

¹⁹ By the custom of London in foreign attachment one indebted to a person whom he was suing could attach the debt in his own hands; *Bohun Privilegia Londoni* (1723) 268; *Hodges v. Cox*, Cro. Eliz. 843 (1600).

²⁰ 2 Freeman 28 (1677).

It was through bankruptcy proceedings that set-off first obtained a foothold in English law. The temporary bankruptcy act of 4 Anne, c. 17, sec. 11, provided that where there had been "mutual credit" given between the bankrupt and any person who was his debtor, the latter should not be compelled to pay more than the balance that appeared due on an adjustment of the account. This statute was followed by others making various improvements in the law which are now embodied in the English bankruptcy act of 1883²¹ and the American act of 1898.²² But equitable jurisdiction over set-offs in cases of bankruptcy was exercised by the Court of Chancery long prior to the introduction of the provision into the statute. In 1676, Lord Guildford, then chief justice of the common pleas, is reported as saying:

"If there are accounts between two merchants, and one of them become bankrupt, the course is not to make the other, who perhaps upon stating the accounts is found indebted to the bankrupt, to pay the whole that originally was entrusted to him, and to put him for the recovery of what the bankrupt owes him, into the same condition with the rest of the creditors; but to make him pay that only which appears due to the bankrupt on the foot of the account; otherwise it will be for accounts betwixt them after the time of the other's becoming bankrupt, if any such were."²³

A similar statement is attributed to Lord Chief Justice Hale, in *Chapman v. Derby*.²⁴ In fact, there can be no doubt that such was the practice of the commissioners of bankruptcy before any statutory provisions on the subject appeared.²⁵

Conflicting opinions have been expressed as to the extent of

²¹ 46 and 47 Vict. C. 52, 38.

²² Act of Congress, July 1, 1898, Chap. 541, 68. For the controversy centering upon the distinction between "mutual credits" and "mutual debts" see *Rose v. Hart*, 8 Taunt. 449 (1818) and the notes to that case in Smith's Leading Cases. For modern views see *Lister v. Hooson* (1908), 1 K. B. 174; *Lord v. Great Eastern Ry.* (1908), 1 K. B. 195; *In re A Debtor* (1909), 1 K. B. 430; *Walther v. Williams M. Co.*, 169 Fed. 270 (1909); *In re Leshner Co.*, 176 Fed. 650 (1910); *In re Michaelis*, 196 Fed. 718 (1912).

²³ Anonymous, 1 Mod. 215 (1676). Note, however, *Provincial Bill Posting Co. v. Low Moor Iron Co.* (1909), 2 K. B. 344.

²⁴ 2 Vernon 117 (1689). In *Garnett & M. G. M. Co. v. Sutton*, 32 L. J. Q. B. 47 (1862), Blackburn, J., states, in the course of argument, that Lord Nottingham when chancellor made an order that an account be stated between the bankrupt and his debtors. The reporter states that he cannot find any reported decision of Lord Nottingham to that effect.

²⁵ *Gibson v. Bell*, 1 Bingh. N. C. 743 (1835) *per* Tindal, C. J. But compare Lord Hardwicke's statement in *Ex parte Prescott*, 1 Atk. 230 (1753).

Chancery's jurisdiction in matters of set-off independent of the statutes. In *Green v. Farmer*,²⁶ Lord Mansfield is reported as saying: "Where there were mutual debts unconnected, the law said they should not be set off; but each must sue. And courts of equity followed the same rule because it was the law." On the other hand, Vice Chancellor Turner, in *Freeman v. Lomas*,²⁷ regarded it as clear "that the rights of debtors and creditors, in cases of cross-demands between them, as those rights subsisted in equity, were not derived from or dependent upon any statutory right of set-off." He thought it not improbable that the statutory rights were founded on the equitable rule and was inclined in agreement with Sir Thomas Clarke²⁸ to deduce the rule from the Roman law. The cases, presently to be referred to, show that Lord Mansfield was in error. But there was no direct adoption of the civil law doctrine as such. On the contrary, there is a material difference between the then prevailing continental view of *compensation*, which of right extinguished the mutual debts, and set-off, which is a cross-demand within the control of the defendant to use if he pleases or to be preserved for a separate action.²⁹ What seems probable is that the law on becoming conscious of a situation that offended common sense, or "natural justice" as it was then called, with its usual baffling eclecticism, borrowed without credit from the foreign, and therefore presumptively outlandish, source the idea but not the form of the doctrine and adapted it empirically to its own needs.

Among the early chancery cases, before either the Bankruptcy Act of 1706 or the Set-off Act of 1729, was *Curson v. African Co.*³⁰ before Lord Keeper North, in 1683, where the plaintiff, when he had agreed to take a portion of his claim like other creditors, was ordered to allow a debt owing by him to the

²⁶ 4 Burr. 2214 (1768), S. C. 1 W. Bl. 651.

²⁷ 9 Hare 109 (1851).

²⁸ Whitaker v. Rush, Amb. 407 (1761). See also Duncan v. Lyon, 3 Johns. Ch. (N. Y.) 351 (1818).

²⁹ Evan's Pothier on Contracts. Appendix B. The civil law doctrine prevails in Louisiana, Code Art. 2203. Compare Putts v. Carpenter, 1 Wils 19 (1743); Minor v. Walter, 17 Mass. 237 (1821); Green v. Darling, 5 Mason 201 (1828); Himes v. Barnitz, 8 Watts 39 (Pa. 1839).

³⁰ 1 Vern. 121 (1683).

company, for, since it was the custom of companies to give credit to those whom they owed, *stoppage* was to be allowed as a good payment. So in *Peters v. Soame*,³¹ in 1701, on a bill by the assignee of a bond where the obligee had become bankrupt and the bond was claimed by the assignees in bankruptcy while the obligor claimed that the obligee was in debt to him, Lord Keeper Wright, though in doubt, thought "that *stoppage* seemed to be a good equity in such case." In *Downham v. Matthews*,³² A, a clothier, and B, a dyer, had mutual dealings in the way of their trade which were carried on for several years without payment of money on either side. B died intestate and indebted to others by specialties who took out administration and sued A at law, who then brought a bill to be relieved. Lord Macclesfield decreed an account and that A should be allowed on discount what was due from B. He said that though generally *stoppage* was no payment, yet in cases of this nature where it appeared that the mutual dealings had been carried on for several years there was a strong presumption of an agreement to that purpose, and that it was the constant use among merchants and traders. Two years later, Sir Joseph Jekyll, master of the rolls, is reported as saying:

"It is true, *stoppage* is no payment at law, nor is it, of itself, payment in equity, but then a very slender agreement for discounting or allowing one debt out of the other, will make it a payment, because this prevents circuity of action and multiplicity of suits, which is not favored in law, much less in equity."³³

In these early cases the practice is described as *stoppage*, because the debtor is in equity allowed to hold back or deduct from the demand against him the amount of his own claim, and it is curious to note that, almost contemporaneously, chancery was developing another equitable doctrine of the same name, *stoppage in transitu*, by which the vendor could rescue from the carrier goods on their way to a vendee who had become bankrupt.³⁴ *Stoppage of goods*

³¹ 2 Vern. 428 (1701).

³² Prec. Ch. 580 (1721), S. C. 2 Eq. Ca. Abr., 9, pl. 8.

³³ *Jeffs v. Wood*, 2 P. Wms. 128 (1723), S. C. 2 Eq. Ca. Abr. 10, pl. 9. See also *Hawkins v. Freeman*, 8 Vin. Abr. 560 (1724); *Berriste v. Berriste*, Nelson 157 (1690); *Lanesborough v. Jones*, 1 P. Wms. 325 (1716).

³⁴ *Wiseman v. Vandeputt*, 2 Vern. 203 (1690); *Sue v. Prescott*, 1 Atk. 245 (1743); *D'Aquila v. Lambert*, Amb. 399n (1761); 2 Kent's Comm. 542.

in transit has become a legal right of great importance; stoppage of debts has changed its name, fortunately indeed, for our legal vocabulary is too constricted as it is.

It is unnecessary to trace further the line of equity cases that followed the enactment of the statutes of set-off. They are discussed at length by Mr. Justice Story, in *Green v. Darling*,³⁵ who concludes:

"Since the statutes of set-off of mutual debts and credits, courts of equity have generally followed the course adopted in the construction of the statutes by courts of law; and have applied the doctrine to equitable debts; they have rarely, if ever, broken in upon the decisions at law, unless some other equity intervened, which justified them in granting relief beyond the rules of law, such as has been already alluded to. And on the other hand courts of law sometimes set off equitable against legal debts, as in *Bottomley v. Brooke* (1 Term R. 619). The American courts have generally adopted the same principles, as far as the statutes of set off of the respective states have enabled them to act."

This is a just estimate of the authorities³⁶ but it is, as well, one of many illustrations that might be given of the timid attitude characteristic of equity jurisprudence in the last years of the eighteenth and the early years of the nineteenth century. Chancery for a time drew back, frightened at its own growth. In recent years it has recovered sufficiently to administer its system of remedial justice on broader principles. "Equity," says Mr. Chief Justice Baldwin, "recognizes rights of set-off which go far beyond those which the early legislation of England and Connecticut introduced in actions at common law."³⁷

³⁵ 5 Mason 201 (1828). The early cases are also well reviewed in *Tuscumbia & R. C. v. Rhodes*, 8 Ala. 206 (1845).

³⁶ *Ex parte Stevens*, 11 Ves. 24 (1805); *Mead v. Merritt*, 2 Paige 402 (N. Y. 1831); *Rawson v. Samuel*, Craig & P. 161 (1839); *Jennings v. Webster*, 8 Paige 503 (N. Y. 1840); *Van Wagoner v. Patterson* G. L. Co., 23 N. J. Eq. 283 (1852); *Spear v. Day*, 5 Wis. 193 (1856); *Smith v. Felton*, 43 N. Y. 419 (1871); *Clarke v. Hawkins*, 5 R. I. 219 (1858); *Lockwood v. Beckwith*, 6 Mich. 168 (1858); *Spaulding v. Boardman*, 122 Mass. 553 (1876); *Mechanics Bank v. Stone*, 115 Mich. 648 (1898); *Fitzgerald v. Wiley*, 22 App. D. C. 329 (1903); *Motion Picture Co. v. Eclair Co.*, 208 Fed. 416 (1913).

³⁷ *Hubley M. & S. Co. v. Ives*, 81 Conn. 244 (1908), S. C. 70 Atl. 615. See also *Crummett v. Littlefield*, 98 Me. 317 (1903); *Porter v. Riseman*, 165 Ind. 255 (1905); *Pruity v. Cahill*, 235 Ill. 534 (1908); *Craighead v. Swartz*, 219 Pa. 149 (1907); *Protrowski v. Czerwinski*, 138 Wis. 396 (1909); *Perry v. Page*, 215 Mass. 403 (1913); *Cromwell v. Parsons*, 219 Mass. 299 (1914).

Although familiar enough as a commonplace of practice, it may be interesting to look back at the early legislation which has influenced the attitude of the courts towards cross-demands more profoundly than the very limited scope of the statutes would have led their authors to expect. In the enactment of such statutes several of the American colonies were many years in advance of the mother country; but it will be more convenient, perhaps, first to consider the English Act of 1729,³⁸ which was adopted in substance in many of the United States and, even in those where it never was in force, has affected legal opinion indirectly through the English cases that interpreted its brief words. The act, which was temporary, and primarily directed to the reform of debtors' prisons and the relief through insolvency proceedings of distressed debtors, contained this clause:

"Where there are mutual debts between the plaintiff and defendant, or if either party sue or be sued as executor or administrator, where there are mutual debts between the testator or intestate and either party, one debt may be set against the other, and such matter may be given in evidence upon the general issue, or pleaded in bar, as the nature of the case shall require, so as at the time of his pleading the general issue, where any such debt of the plaintiff, his testator or intestate, is intended to be insisted on in evidence, notice shall be given of the particular sum or debt so intended to be insisted on, and upon what account it became due, or otherwise such matters shall not be allowed in evidence upon such general issue."

It is significant that this modification of the law was introduced through the medium of an insolvency act, for the settlement of an insolvent's estate presents problems closely akin to those of bankruptcy. The statute does not, however, stop with insolvency, but provides generally for the set-off of debts in courts of law, referring particularly to suits brought after the death of one of the parties. So also, it permits the then new-fangled practice of pleading the general issue and giving the evidence under notice of special matter.³⁹ On the other hand,

³⁸ 2 Geo. II, Chap. 22, Sec. 13.

³⁹ *Gower v. Hunt*, Barne's Notes 291 (1735), S. C. Bull. N. P. 177; 1 Tidd. Pr. (9th Ed.) 662; this has continued to be the practice in some states although, generally, set-off is specially pleaded. 19 Enc. Pl. & Pr. 739.

the act is restricted to "mutual debts" while the bankruptcy acts included "mutual credits," thereby giving rise to a controversy no longer important.⁴⁰ It was doubted whether mutual debts of a different nature could be set off;⁴¹ hence when this clause of the Act of 1729 was made perpetual in 1735,⁴² it was expressly enacted that mutual debts should be set off "notwithstanding that such debts are deemed in law to be of a different nature." Once these statutes were adopted the court extended the remedy somewhat beyond their letter. Thus at the outset of an action they would not permit a plaintiff in his affidavit to hold to bail to swear to one side only of an account; an arrest, made without giving credit for items clearly due, was held without probable cause and actionable.⁴³ So also, a judgment in one action was set off against a judgment in another action;⁴⁴ and, where parties had mutual demands for costs against each other, the court on motion would order them to be set off.⁴⁵ Nevertheless the practice was confined within narrow bounds, as is well summarized by Lord Chief Justice Cockburn, in *Stoke v. Taylor*,⁴⁶ as follows:

⁴⁰ See *supra*, note 22. The insolvency act of 32 Geo. II, Chap. 28, Sec. 23 (The Lords' Act), provided that where mutual credit had been given between a prisoner and another the assignees for creditors could demand the balance only.

⁴¹ *Kemys v. Betson*, 8 Vin. Abr. 561 (1733); *Stephens v. Lofty*, 2 Barnard 339 (1733); *Hutchenson v. Sturges*, Willes 261 (1741).

⁴² 8 Geo. II, Chap. 24, Sec. 5. There was a proviso that if either of the debts accrued by reason of a penalty in a bond the debt should be pleaded in bar. The day after the Act of 1735 passed, Lord Hardwicke, C. J., said that a debt by simple contract might by the former act have been set off against a specialty. *Brown v. Holyoak*, Bull. N. P. 175 (1735).

⁴³ *1 Sellon's Pr.* (1798) 322; *Dronefield v. Archer*, 5 B. & Ald. 513 (1822); *Austin v. Debram*, 3 B. & C. 139 (1824), disapproving *Brown v. Pidgeon*, 2 Camp. 594 (1811).

⁴⁴ *Barker v. Braham*, 2 W. Bl. 869 (1773), *S. C.* 3 Wils. 396; *Mitchell v. Oldfield*, 4 Term. R. 123 (1791); *Glaister v. Hewer*, 8 Term. R. 69 (1798); *Bremerton v. Harris*, 1 Johns. 144 (N. Y. 1806); *Goodenow v. Buttrick*, 7 Mass. 140 (1810); *Burns v. Thornburgh*, 3 Watts 78 (Pa. 1834); *Brown v. Hendrickson*, 39 N. J. L. 239 (1877); *Ehrhart v. Esbenshade*, 53 Pa. Super. Ct. 258 (1913).

⁴⁵ *Nunez v. Modigliani*, 1 H. Bl. 217 (1780); *Howell v. Harding*, 8 East 362 (1807).

⁴⁶ (1880) 5 Q. B. D. 569, at p. 575. See also *Rawley v. Rawley* (1876), 1 Q. B. D. 460; *Brazelton v. Nashville & C. R. Co.*, 3 Head 570 (Tenn. 1859); *B. & O. R. Co. v. Jameson*, 13 W. Va. 833 (1878). As will be shown, some of the American statutes were broader in scope. See 34 Cyc. 760. As to unliquidated demands see 34 Cyc. 654, 693.

"By the statutes of set off this plea is available only where the claims on both sides are in respect of liquidated debts, or money demands which can be readily and without difficulty ascertained. The plea can only be used in the way of defence to the plaintiff's action, as a shield, not as a sword. Though the defendant succeeded in proving a debt exceeding the plaintiff's demand, he was not entitled to recover the excess; the effect was only to defeat the plaintiff's action, the same as though the debt proved had been equal to the amount of the claim established by the plaintiff and no more."

To which it may be added that there could be no set-off, unless both debts were due ⁴⁷ and held in the same right. Strict mutuality was requisite and, where it did not exist, a technical set-off was impossible.⁴⁸

Turning now to the American colonies, it is surprising to find Virginia enacting a statute of set-off eighty-four years before the mother country. The Act of 1645,⁴⁹ apparently the first of its kind, is as follows:

"Be it enacted by the authoritie of this present Grand Assembly for avoiding causes and suits at law, that where any suit shall be commenced in quarter court or county court, that if the defendant have either bill, bond or accompt of the plt. wherein he proves him debtor, that in such cases the courts do balance accs. consideration being had and allowance given to the plt. for his charges who first began his suit, as alsoe to the time when such bills, bonds, accompts or demands were due to be compared with the accs. in balance, and this act to continue until the next assembly "

The act was made perpetual at the session of 1646,⁵⁰ and was included, with some slight changes, in the general revisions of the statutes that were made at the sessions of 1658⁵¹ and

⁴⁷ Richards v. James, 6 D. & L. 52 (1848); Cobb v. Curtiss, 8 Johns 470 (N. Y. 1811); Zuck v. McClure, 98 Pa. 541 (1881). Compare in bankruptcy *Ex parte* Prescott, 1 Atk. 230 (1753); Morgan v. Wordell, 178 Mass. 350 (1901).

⁴⁸ Isberg v. Bowden, 8 Exch. 852 (1853); Watkins v. Zane, 4 Md., Chap. 13 (1847); Ryan v. Barger, 16 Ill. 28 (1854); Bentz v. Bentz, 95 Pa. 216 (1880).

⁴⁹ February 17, 1644-5, 1 Hening's Laws 294. The quarter court was that of the Governor and council.

⁵⁰ March, 1645-6, 1 Hening's Laws 314.

⁵¹ March 13, 1657-8, 1 Hening's Laws 449.

1662,⁵² but would seem to have been supplied by the Act of 1705,⁵³ which gave the defendant, in an action for any debt, "the liberty upon trial thereof to make all the discount he can against such debt." This act appeared in the collection of laws of 1769,⁵⁴ but was omitted from subsequent revisions and, doubts having arisen as to whether there was any law in force regulating discounts and offsets, a declaratory act was passed in 1806,⁵⁵ substantially re-enacting the law of 1705.

Such, in brief, is the story of this innovation. But who was the originator? Was it the result of a personal grievance, or a bold venture upon the herculean task of law reform? The facts may be hidden in the archives or correspondence of the time, but the statute book does not tell us. We know little of the pedigree of more famous statutes. It may be worth noting, however, that the assembly which passed the Act of 1645 met in disturbed times. The Civil War was raging in England—it was the year of Naseby; Governor Berkeley had returned to England; and sitting in the council were noted roundheads, including Richard Bennett and William Claiborne, the party leaders, appointed in 1651 commissioners "for the reducing of Virginia and the inhabitants thereof to their due obedience to the Commonwealth of England."⁵⁶ It is also somewhat significant that when Bennett and Claiborne overthrew the proprietary government of Maryland in 1654, there was included among the acts passed by the Assembly held at Patuxent that year an act for discounting debts.⁵⁷ This much is clear: the unsettled political conditions

⁵² March, 1662, 2 Hening's Laws 110.

⁵³ October, 1705 (4 Anne), 3 Hening's Laws 378.

⁵⁴ 22 Geo. II, Chap. 27, par. 6, p. 249.

⁵⁵ Dec. 29, 1806 (Collection of 1808, p. 117). This act remained in force until the revision of 1849. *Allen v. Hart*, 18 Gratt. 722 (Va. 1868); *Wartman v. Yost*, 22 Gratt. 549 (Va. 1872); *B. & O. R. R. Co. v. Jameson*, 13 W. Va. 833 (1878).

⁵⁶ "Maryland Under the Commonwealth," by B. C. Steiner, *JOHNS HOPKINS UNIV. STUD.*, Vol. 29, p. 53.

⁵⁷ Act of Oct. 20, 1654, Chap. 23, 1 Md. Arch. (Asso.) 346. The words of the act are as follows: "All lawful accompts produced and proved in court the defendants part shall hold play to the plfts. suit for debt. And shall be satisfactory to his demands, except the said account be above nine months' standing." For subsequent legislation see note to *Strike's Case*, 1 Bland., Chan. 79 (1817).

offered an unusual opportunity for the unobstructed enactment of legislation of bourgeois interest, and it is highly probable that some member or members of the popular party who, as lay justices perhaps, had been confronted with this very problem, carried the act as a measure of practical reform in an assembly hostile to lawyers and lawyers' ways. Indeed, it was this assembly that passed the famous act prohibiting attorneys from practicing in the courts for money, for the reason that suits had been multiplied by the "unskilfullness and covetousness of attorneys."⁵⁸ More cannot be said. Such legislation was not part of the conscious programme of the American Puritan whose principal concern was the theocratic state. In England the common law bar was "the soul of the rebellion." But, on comparing the great constitutional and institutional reforms with the meagre improvements in private law under the commonwealth, one is convinced that the Puritan lawyer had the faults and virtues common to the legal profession—today as well as yesterday—a genuine love for politics and public life coupled with a decided distaste for systematic jurisprudence.⁵⁹

Coming now to Pennsylvania and remembering the advanced views held by William Penn upon the subject of law reform, it is not surprising to find among the laws proposed by the proprietor and adopted at the first assembly held at Chester, December 1, 1682, an act providing:

"That for avoiding numerous suits, if two men dealing together, be indebted to each other, upon bonds, bills, bargains or the like, provided they be of equal clearness and truth, the defendant shall in his answer acknowledge the debt which the plaintiff demandeth, and default what the plaintiff oweth to him upon like clearness."⁶⁰

The exceptional features of this statute are, first, the adop-

⁵⁸ 1 Hening's Laws 302. See "Justice in Colonial Virginia," by O. P. Chitwood, *JOHNS HOPKINS UNIV. STUD.*, Vol. 23, p. 116.

⁵⁹ Robinson's *Anticipations under the Commonwealth of Changes in the Law*, 1 *Select Essays in Anglo-American Legal History* 467. So in the United States, constitutional and public law have engrossed the ablest legal minds to the exclusion of private law.

⁶⁰ Charter and Laws of Penna., 118.

tion of the old law Latin word *defalcatio*,⁶¹ thereby adding another appellation to this over-named branch of procedure, and, second and more important, that it is not limited to technical debts and, although somewhat indefinite, is admittedly more comprehensive than the subsequent English acts.⁶² The ready acceptance of this act may have been due partially to the fact that several of the assemblymen had long served as justices of the local courts under the former government of the Duke of York and were familiar with the problem. In the minutes of the early courts, there are cases where mutual accounts were set off against each other, although whether this was by consent⁶³ or in the exercise of undefined equitable power is not always to be gathered from the minutes.⁶⁴ In at least one case where the plaintiff refused to allow a deduction, the court gave judgment for the plaintiff leaving the defendant's claim open to action.⁶⁵ The soil was favorable for juridical experiments; the traditions of the Dutch were of the civil law, while the pietism and practical shrewdness of the Quakers combined to produce an attitude of hostility to contentiousness. Some of these experiments failed, such as the provision for official peacemakers, but the defalcation act after some vicissitudes took root. With the other colonial laws it was abrogated when the province was seized by William and Mary in 1693,⁶⁶ but was among the laws temporarily continued in force by Governor Fletcher. After Penn's restoration it was substantially re-enacted in 1700,⁶⁷ but a slight change in the wording caused its downfall. The new act provided that the debts to be defalked must be of "like dignity and clearness."

⁶¹ Brackenridge's Law Miscellanies 186. The word is used by Fleta, Lib. 2, Chap. 57, par. 11.

⁶² Sparks v. Garrigues, 1 Binn. 151 (Pa. 1806); Steigleman v. Jeffries, 1 S. & R. 477 (Pa. 1815); Gogel v. Jacoby, 5 S. & R. 117 (Pa. 1819); Ellmaker v. Franklin F. I. Co., 6 W. & S. 439 (Pa. 1843).

⁶³ As is clearly the case in Linsey v. Johnson, Upland Court Records 84 (1678).

⁶⁴ See Records of the Court of New Castle, pp. 151, 153, 422, 445, 473, 486, 494. See also Records of the Courts of Chester County, p. 17.

⁶⁵ Test v. Laersen, Upland Court Records 68 (1677).

⁶⁶ Charter and Laws of Penna., 220, 547.

⁶⁷ 2 Stat. at Large Penna. 45.

When the laws were transmitted to Queen Anne for approval, Northey, the attorney general, reported: "This is a good law, but it had been better if the setting off of debts on stating accounts, had been general, and not restrained to the setting off of debts against others of like dignity only."⁶⁸ The act was therefore rejected by the queen in council.

Upon the disapproval of the Act of 1700 the assembly passed the Act of January 12, 1705-6,⁶⁹ which was allowed to become a law by the queen's advisers. While preserving some of the words of the first act, it is much more elaborate and contains a new and ingenious clause providing that if it appear that the plaintiff is overpaid, then the jury shall give their verdict for the defendant and certify to the court the amount the plaintiff is indebted to the defendant, which shall be recorded with the verdict and become a debt of record. This provision for affirmative relief to the defendant for the excess of his claim over the plaintiff's demand was unknown in recoupment,⁷⁰ nor does it appear in the earlier Virginia or later English acts. There is some resemblance to the *reconvention* of the canon law by which the defendant was permitted to introduce a counter demand into the litigation which proceeded simultaneously with the original demand, the parent of the cross-bill in equity.⁷¹ It is not impossible that the basic idea of the certificate of set-off may have been suggested from this course. On the other hand, there is nothing to show that the thought was not original, the product of a happy flash of common sense on the part of the draughtsman of the act, an inference supported by the fact that the award is not called a judgment, but a debt of record, upon which the defendant must

⁶⁸ 2 Stat. at Large Penna. 493.

⁶⁹ 2 Stat. at Large Penna. 241; 2 P. & L. Dig. (2d Ed.) 2844. See 2 Pa. Colonial Records, 214, 220, 239.

⁷⁰ Lufburn v. Henderson, 30 Ga. 482 (1860); Waterman v. Clark, 76 Ill. 428 (1875); B. & O. R. Co. v. Jameson, 13 W. Va. 833 (1878); Union Bank v. Blanchard, 65 N. H. 21 (1888).

⁷¹ Decret. Greg. L. II, tit. x, Chap. 2; Decret. Greg. L. II, tit. iv, Chap. 1; Conset's Practice of the Spiritual Courts 339; Guilbert's Forum Romanorum 45; Story, Equity Pleadings, par. 402; Lanusse v. Pimpinella, 4 Martin N. S. 439 (La. 1826); Walcott v. Hendrick, 6 Tex. 406 (1851); Duncan v. Magette, 25 Tex. 245 (1860); Suberville v. Adams, 47 La. Ann. 68 (1895).

proceed by *scire facias*, a favorite writ in this colony where it was put to uses unknown to the common law. At any rate, the fundamental soundness of the act, in spite of its verbosity and lack of precision, is confirmed by its subsequent history. A defendant obtaining a certificate is now entitled to judgment and execution without *scire facias*,⁷² but otherwise the law remains unchanged and is still in force. It is true that the Insolvency Act of February 14, 1729-30,⁷³ contained a clause copied almost verbatim from the statute of 2 Geo. II, but the two acts were construed *in pari materia* and the second was repealed upon a revision of the insolvency laws in 1814.⁷⁴

In 1714 New York enacted a statute which must have been derived from the Pennsylvania act, for the language is nearly identical. As printed below,⁷⁵ with the words and clauses bracketed that vary from the Pennsylvania act, it will be seen that the only material differences are the substitution of the term "discount" for "default" and the requirement that written notice be given with the plea, of the special matter intended to be relied on

⁷² By an amendment of April 11, 1848, P. L. 536, Sec. 12, 2 P. & L. Dig. (2d Ed.) 2850.

⁷³ 4 Stat. at Large Pa. 171, par. 7; 1 Smith's Laws of Pa. 181, Sec. 10, see *Primer v. Kuhn*, 1 Dall. 452 (1789).

⁷⁴ March 26, 1814, Smith's Laws of Pa. 202. And see Sec. 23 of the Act of June 13, 1836, P. L. 729, 2 P. & L. Dig. (2d Ed.) 4012. The Practice Act of May 14, 1915, P. L. 483, Sec. 14, provides that in assumpsit (which in Pa. includes debt and covenant) a defendant may set off or set up by way of counter-claim against the claims of the plaintiff any right or claim for which an action of assumpsit would lie. See article by David Werner Amram, Esq. in 64 UNIV. OF PENNA. L. REV. 257. As to set-off in justices' courts see Sec. 7 of the Act of March 28, 1810, 5 Sm. L. 161, 2 P. & L. Dig. (2d Ed.) 4349.

⁷⁵ "Be it enacted, *etc.*, That if [any] two or more dealing together be indebted to each other upon bonds, bills, bargains, promises, accounts, or the like and one of them commence an action in any court of this [colony], if the defendant cannot gainsay the deed, bargain or assumption upon which he is sued it shall be lawful for such defendant to plead payment of all or [any] part of the debt or sum demanded, [giving notice in writing, with the said plea, of what he will insist upon at the trial for his discharge] and give any bond, bill, receipt account or bargain [so given notice of] in evidence, and if it shall [happen] that the defendant hath fully paid or satisfied the debt or sum demanded, the jury shall find for the defendant and judgment shall be entered that the plaintiff shall take nothing by his writ and shall pay the costs. And if it shall appear that any part of the sum demanded is paid, then so much as is found to be paid shall be [discounted] and the plaintiff shall have judgment for the residue only, with costs of suit. But

as an off-set. The latter provision corrected a grave defect in the earlier act and anticipated the similar provision in the English act. In Pennsylvania, the omission was supplied by the Act of 1729-30 and later by rule of court.⁷⁶ New York, however, in this respect differing from its neighbor, was not content with the form of the statute, but improved it in a subsequent revision of the laws relating to practice.⁷⁷ It is also significant that the assembly, in 1768, referring to the burdening of jurors which is "greatly increased since the law made for permitting discounts in support of the plea of payment," passed an act for the compulsory reference of cases involving long accounts.⁷⁸ Curiously enough, New York was the one colony where the ground was prepared for the reception of set-off, as the Dutch settlers were familiar with corresponding civil law practice. There are numerous cases in the records of the court of New Amsterdam, involving such questions, one of which will suffice as an illustration:

"Matewis Vos, pltf. vs. Adriaen Keyser, deft. (Mar. 10, 1653, City Hall.) Pltf. as curator of the estate of Andrees Johan Cristman demands from the deft. payment of 27 fl. 13st. book debts. Deft. admits having received the goods except a quart measure, a pint measure and a pair of snuffers amounting to 7 fl. 13 st. and makes a counter-claim of 13 fl. 12 st. for silver and gold gagoon delivered to said Christman decd. May 8, 1652, so he owes only 6 fl. 8 st. He declares this to be true and offers to swear to it. Pltf.

if it appear to the jury that the plaintiff is overpaid, then they shall give in their verdict for the defendant, and withal certify to the court how much they find the plaintiff to be indebted or in arrear to the defendant more than will answer the debt or sum demanded, and the sum or sums so certified shall be recorded with the verdict, and shall be deemed as a debt of record, and if the plaintiff refuse to pay the same the defendant for recovery thereof shall have a *scire facias* against the plaintiff in the said action and have execution for the same, with costs of that action, any law, usage [or custom] to the contrary in any wise notwithstanding." Act of 1714, Bradford's Laws (1726), p. 93.

⁷⁶ Troubat & Haly's Practice (1825) 134.

⁷⁷ Act of April 5, 1813, par. 1, 1 Laws of N. Y. (Van Ness & Woodworth) 515. For the history of the New York legislation see *Steck v. Colorado Fuel Co.*, 142 N. Y. 236 (1894).

⁷⁸ Act of Dec. 31, 1768, Chap. 1363; Colonial Laws of N. Y., Vol. IV, p. 1040; *Luther v. Walton*, 1 Caines Rep. 149 (N. Y. 1803); *Adams v. Bayles*, 2 Johns. 374 (N. Y. 1807); Act of April 5, 1813, Sec. 2, Laws of N. Y. (Van Ness & Woodworth) 516; *Snell v. Niagara Paper Mills*, 193 N. Y. 432 (1908).

requests, that whereas the estate is insolvent, deft. must come in with the other creditors. Burgomasters and schepans decide that deft. may deduct from the demanded sum his counter-claim and the things not received." ⁷⁹

But upon the conquest by the English this practice does not seem to have been continued under the Duke of York's laws, which were derived principally from New England.

New Jersey, too, was among the colonies that adopted the practice prior to the English statute. The act was among those passed by the general assembly at Perth Amboy, May 5, 1722,⁸⁰ and recited in the preamble that many vexatious suits had been brought by troublesome and litigious persons when upon a just balance of accounts there has been nothing due and the defendant had no remedy but by cross action. The text follows closely the language of the New York Act of 1714, but expressly includes justices' courts and also requires that the defendant shall plead his set-off "or else forever after be barred of bringing any action for that which he might or ought to have pleaded by virtue of this act." This is an unusually stringent rule. Under the act of 2 Geo. II, and in most of the American states, set-off is optional, not compulsory.⁸¹ The obvious spirit and policy of the New Jersey statute was not only to encourage, but to enforce the adjustment of such demands in one action.⁸² There are indications of an abnormal lack of sympathy for one of the supposed in-

⁷⁹ 1 Records of New Amsterdam 63. See other cases in the same volume, pp. 105, 108, 114, 120, 138, 162. The word counter-claim is the translator's rendering of the Dutch.

⁸⁰ Laws of New Jersey (Ed. of 1752), p. 98; Allinson's Laws of N. J. (1776), p. 66. The act was revised but not substantially changed November 1, 1797 (R. S. 801). For a history of subsequent revisions see Godkin v. Bailey, 74 N. J. L. 655 (1906); 4 Comp. Stat. N. J. (1910) 4836. The Practice Act of 1912 provides: "Subject to rules, the defendant may counter-claim or set off any cause of action."

⁸¹ Brisbane v. Dacres, 5 Taunt. 143 (1813), at p. 148; Morton v. Bailey, 2 Ill. 213 (1835); Minor v. Walter, 17 Mass. 237 (1821); Himes v. Barnitz, 8 Watts 39 (Pa. 1839); Broughton v. McIntosh, 1 Ala. 103 (1840); *contra*, Turk v. Shein, 55 W. Va. 466 (1904). In several jurisdictions the rule is different in justices' courts. Douglas v. Hoag, 1 Johns. 233 (N. Y. 1806); Welch v. Hazelton, 14 How. Pr. 97 (N. Y. 1857); Herring v. Adams, 5 W. & S. 459 (Pa. 1843); Waterman on Set-Off, Sec. 574.

⁸² Schenk v. Schenk, 10 N. J. L. 276 (1829); Henry v. Milham, 13 N. J. L. 266 (1832). Compare Sec. 12 of the Practice Act of 1912.

alienable rights of a free man—the right to waste an unlimited amount of public time.

It is unnecessary to trace the history of other legislation that followed the enactment of the statutes of George II.⁸³ The most interesting of the later acts are those of Massachusetts. In that province a brief law of 1730-31 authorized a person sued in debt "due by book" to plead "what is due upon his book by way of balance." Doubts having arisen upon this act, an explanatory act was passed in 1732-33,⁸⁴ which provided that a person sued in debt or case "for any sum of money due upon contract between the parties for any goods sold, or service done, whether the account be open or a balance thereof be made and signed by the parties (except specialties and express contracts in writing)" might plead specially or upon the general issue give in evidence "what is due upon his book by way of balance to the plaintiff's demand." This law cannot have been generally observed, for in 1742-43 the general court passed a new act in nearly the same terms which recited in the preamble that it was the "common practice to give judgment without admitting any account in favour of the defendant."⁸⁵ The statutes of 1784 and 1793⁸⁶ followed substantially the provincial statutes, and as Chief Justice Shaw points out in *Stowers v. Barnard*,⁸⁷ "the consequence is that whilst demands for unliquidated damages may be proved in set-off, the highest classes of debts cannot be so proved." The learned Chief Justice

⁸³ Delaware, at first united to Pennsylvania, passed an act in 1739 which also repealed the earlier act. *Laws of Delaware* (1797), p. 162. South Carolina in 1733 passed an act allowing discounts on behalf of decedents' estates, 3 Stat. at Large 342, which was made general in 1744. 3 Stat. at Large 611, 792. The North Carolina Act of 1756 is similar to the English Act. *N. Car. Laws* (1821), p. 197. So also, the New Hampshire Act of 1765, *Prov. Stat. N. H.* (1771), p. 195. See further *Chandler v. Drew*, 6 N. H. 469 (1834); *Martin v. Trowbridge*, 1 Vt. 481 (1829); *Greene v. Darling*, 5 Mason 201 (1828, Rhode Island); *Meriwether v. Bird*, 9 Ga. 594 (1851). In Connecticut the first statute on set-off was passed in 1820. *Meeker v. Thompson*, 43 Conn. 77 (1875).

⁸⁴ *Charter & Laws of Massachusetts Bay* (1742), p. 291. There was a further provision for the setting off of mutual executions.

⁸⁵ *Temporary Acts of Massachusetts Bay* (1755), p. 30. This act was limited to seven years but was revived and continued.

⁸⁶ Oct. 30, 1784, Sec. 12, 1 Gen. Laws (1823), p. 169; Feb. 27, 1793, Sec. 4, 1 Gen. Laws (1823), p. 451.

⁸⁷ 32 Mass. 221 (1834).

suggests that this may be accounted for on the hypothesis that, when the provincial acts were passed, it was understood that the English statutes, then recently enacted, would be extended to the province without re-enactment and that the provincial statutes were intended to complete the system. If such was the understanding it was a mistaken one and the anomaly has long since been remedied.⁸⁸

It would be interesting to know whether an impetus was given to the English legislation by the prior colonial acts or whether the legislation on both sides of the Atlantic was the outgrowth of a common feeling of impatience with a practice that no longer appeared rational. But the point is not important. Two distinct motives may be detected; one based on the idea that an injustice is done the defendant in refusing him this privilege, the other that unnecessary lawsuits are a nuisance. The predominance of the latter notion leads to enactments favoring affirmative relief for the defendant; the predominance of the former to purely defensive statutes. But in the minor details of practice, the prevalent use of the common stock of precedents, tends to develop a certain rough uniformity in the law, not too insistent on the basic legislation, with occasional divergences due usually to some refractory phrase in the local act.

By the first quarter of the nineteenth century it may be said that through statutes, and in some instances the liberal construction of such statutes, the principle has developed to this extent; the right to plead and prove a counter demand, growing out of an independent transaction for which an action might be maintained by the defendant, as an offset to defeat the plaintiff's recovery in whole or part, is generally recognized, and, in some states, an affirmative judgment for the defendant is permitted. Under all the statutes liquidated demands can be set off and, very generally, the right is restricted to such demands. Some statutes are so construed as to allow unliquidated claims arising out of contract to be set off, but upon this subject there is regrettable confusion, depending as the cases do, partly on the interpretation of the respec-

⁸⁸ Rev. Stat. 96, Secs. 1-5, Rev. Laws Mass. (1902), Chap. 174, Vol. 2, p. 1572.

tive acts and partly on the policy of the courts in enlarging or restricting the right.⁸⁹ Limited by statute to actions upon debts and contracts, the almost universal rule is not to permit set-offs in tort actions,⁹⁰ and, in a similar manner, in contract actions to disallow set-offs arising out of torts.⁹¹ Recoupment, on the other hand, although frequently confused with set-off, is recognized as a distinct principle, namely, the right to present in opposition to the plaintiff's claim, for its reduction or extinguishment, a right of action in the defendant for loss or damage sustained by him in the same transaction through breach of contract or duty on the part of the plaintiff.⁹²

Such is a rough composite picture of the present state of the law of set-off in many jurisdictions, representing the maximum development so far attained. Further progress will depend upon other considerations. Devised in aid of the common law and adapted to its unreformed procedure, its rigid actions, artificial pleadings, and theory of a single issue, minor advantages only can be obtained from efforts to make set-off more flexible, before the procedure itself is recast upon simpler lines.

The upheaval, which about the middle of the nineteenth century led to adoption of code pleading in so many of the states, introduced a new practice in this branch of law and a new term to describe it—*counter-claim*. Not in the original New York Code of 1849,⁹³ it first appeared in the amendments of 1852,⁹⁴

⁸⁹ See generally the cases collected in the notes to 24 Amer. & Eng. Enc. of Law (2d Ed.), 505, and 34 Cyc. 693, *et seq.*; Hunt v. Gilmore, 59 Pa. 450 (1868); Ahl v. Rhoads, 84 Pa. 319 (1877).

⁹⁰ Talbot v. Whipple, 73 Mass. 122 (1856); Collins v. Groseclose, 40 Ind. 414 (1872); Marlowe v. Rogers, 102 Ala. 510 (1893); Goldberger v. Leibowitz, 44 Colo. 99 (1908); Wagner v. Prettyman, 53 Pa. Super. Ct. 316 (1913).

⁹¹ Edwards v. Davis, 6 N. J. L. 391 (1797); Robinson v. L'Engle, 13 Fla. 482 (1870); Kingman v. Draper, 14 Ill. App. 577 (1884); Groetzinger v. Latimer, 146 Pa. 628 (1892); Jenkins v. Rush Brook C. Co., 205 Pa. 166 (1903); Williams P. C. Co. v. Kinsey Co. 205 Fed. 375 (1913).

⁹² Stow v. Yarwood, 14 Ill. 424 (1853); Ward v. Fellers, 3 Mich. 281 (1854); Grand Lodge v. Knox, 20 Mo. 433 (1855); Davenport v. Hubbard, 46 Vt. 200 (1873); Keegan v. Kinnare, 123 Ill. 280 (1887); Babbitt v. Moore, 51 N. J. L. 229 (1889); Grisham v. Bodman, 111 Ala. 194 (1895); Jarrett L. Co. v. Reese, 66 Fla. 317 (1913); Bennett v. Kupfee Co., 213 Mass. 218 (1913); Houghton v. Alpha P. Co., 93 Atl. 669 (Del. 1915).

⁹³ Act of April 11, 1849, Laws of N. Y., Chap. 438, p. 613.

⁹⁴ Act of April 16, 1852, Laws of N. Y., Chap. 392, pp. 654, 149, 150.

and like most intruders was coldly received. It is described as "this unfortunate compound which has been pressed, by our modern Solons, into the service of the *fourth* and it is to be hoped the *last* edition of the code," "this superfluous interpolation which is not found in our best dictionaries and has been hitherto unknown to our statutes."⁹⁵ Another court doubts "whether a more perplexing, undefinable, impracticable combination of words could have been joined together in the English language than those selected in this particular by the modern reformers, who claim to stand as sponsors to the present code."⁹⁶ With all due allowance for the natural irritation of a bench compelled to change the habits of a lifetime, it must be admitted that the word was well suited to convey the meaning of the codifiers, and that if a departure from tradition was intended, as was unquestionably the case, it was better to adopt a new terminology than to attempt the hopeless task of redefining phases already restricted by a network of precedents. The "unfortunate compound" not found in the "best dictionaries" has, like many an upstart, worked its way into good society, has traveled far, and has been well received abroad.

As originally defined, the counter-claim must be one existing in favor of a defendant and against a plaintiff between whom a several judgment might be had in the action, and arising out of one of the following causes of action: (1) a cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action; (2) in an action on contract, any other cause of action arising also on contract, and existing at the commencement of the action.⁹⁷ Although there are local variations this is substantially the counter-claim of the American code state.

⁹⁵ *Roscoe v. Maison*, 7 How. Pr. 121 (N. Y. 1852).

⁹⁶ *Silliman v. Eddy*, 8 How. Pr. 122 (N. Y. 1853).

⁹⁷ New York Code of Procedure, Sec. 150. The corresponding section of the present code of civil procedure, which modifies somewhat the original text, is 501. For the variations in the different state statutes see Pomeroy's Remedies (3d Ed.), Sec. 583.

To treat even superficially the great host of cases devoted to the interpretation of these apparently simple clauses would unduly prolong this discussion.⁹⁸ This much is pertinent. The counter-claim described in the second subdivision corresponds to the prior statutory set-off, but is more comprehensive, including, by the weight of authority, unliquidated demands⁹⁹ as well as certain claims for equitable relief. That described in the first subdivision is much broader than the old recoupment;¹⁰⁰ affirmative relief is given where the defendant's damages exceed those of the plaintiff. Moreover, a cause of action in either tort or contract may be offered as a counter-claim in either tort or contract provided both causes of action arise out of the same transaction.¹⁰¹ But the practice is highly technical, depending frequently upon close questions as to the meaning of the terms "transaction," "cause of action," and "subject of action," a labyrinth into which only the venturesome would intrude.¹⁰² The tort cases, where on the one hand, it is sought to prove a connection between the seemingly independent acts and, on the other hand, to disprove a connection between acts clearly consequent upon one another, are in many respects conflicting and offer in themselves a special field for investigation.¹⁰³ A doctrine also obtains, fortified in some instances by statute, that the cause of action in the counter-claim must be such as will inevitably tend to defeat or diminish the

⁹⁸ See generally Bliss on Code Pleading (3d Ed.), Chap. 18; Pomeroy's Remedies (3d Ed.), Sec. 726; 25 Amer. & Eng. Enc. of Law (2d Ed.) 568; 34 Cyc. 618.

⁹⁹ *Stockton v. Graves*, 10 Ind. 294 (1858); *Stoddard v. Treadwell*, 26 Cal. 204 (1864); *Schubart v. Harteau*, 34 Barb. 447 (N. Y. 1861); *McAdow v. Ross*, 53 Mo. 199 (1873); *Clement v. Field*, 147 U. S. 467 (1893); *Wollan v. McKay*, 24 Ida. 691 (1913); *Hicksville R. Co. v. Hardy*, 48 Barb. 355 (N. Y. 1867).

¹⁰⁰ *Vail v. Jones*, 31 Ind. 467 (1860); *Sigler v. Hidy*, 56 Ia. 504 (1881); *Cornelius v. Kessel*, 58 Wis. 237 (1883); *Dempsey v. Rhodes*, 93 N. C. 120 (1885); *Duffy v. England*, 96 N. E. 704 (Ind. 1911). But see *Jones v. Moore*, 42 Mo. 413 (1868), and *Fulton v. Fisher*, 239 Mo. 176 (1911).

¹⁰¹ *Leavenworth v. Packer*, 52 Barb. 132 (N. Y. 1867); *Hay v. Short*, 49 Mo. 139 (1871); *Bloom v. Lehman*, 27 Ark. 489 (1872); *Stanley v. Northwestern M. L. Co.*, 95 Ind. 254 (1883).

¹⁰² *Campbell v. Fox*, 11 Ia. 318 (1860); *Pierce v. Tiersch*, 40 Ohio St. 168 (1883); *Thompson v. Sanders*, 118 N. Y. 252 (1890).

¹⁰³ Compare *Barhyte v. Hughes*, 33 Barb. 320 (N. Y. 1861); *Ward v. Blackwood*, 48 Ark. 396 (1886); *Rothschild v. Whitman*, 132 N. Y. 472

plaintiff's claim; that is, the two demands must be antagonistic and tend to destroy each other.¹⁰⁴ The defendant, therefore, cannot set up in an action any and every cause of action he may have against the plaintiff, but can only plead such a cause of action as constitutes a valid statutory counter-claim.¹⁰⁵ In some of the states the term although used in the practice acts is not defined, as it is in the codes, and its scope has been left to judicial determination.¹⁰⁶ Upon this subject it has been laid down in Connecticut:

"A defendant by a counter-claim under the statute, cannot bring in for adjudication any matter that is not so connected with the matter in controversy under the original complaint that its consideration by the court is necessary for a full determination of the rights of the parties as to such matter in controversy, or, if it is of a wholly independent character, is a claim upon the plaintiff by way of set off, and not a claim against a co-defendant."¹⁰⁷

In England, technical set-off remains confined within the limits set by the Acts of 2 Geo. II, for those acts have not been repealed; but, under the reformed procedure, counter-claim has developed beyond the point attained in American practice. The Judicature Act of 1873 conferred upon the High Court very wide powers in granting relief to defendants,¹⁰⁸ and, under the rules of

(1892); *Braithwaite v. Akin*, 3 N. Dak. 365 (1893); *Watts v. Gantt*, 42 Neb. 869 (1894); *Block v. Swago*, 10 Ind. App. 600 (1894); *Glide v. Kayser*, 142 Cal. 419 (1904); *Wrege v. Jones*, 13 N. Dak. 267 (1904); *Roberts v. Jones*, 71 S. Car. 404 (1904); *Smith v. Alvord*, 31 Utah 346 (1906), with *Stone v. Stone*, 2 Metc. 339 (Ky. 1859); *McArthur v. Green Bay Co.*, 34 Wis. 139 (1874); *Pacific Express Co. v. Malin*, 132 U. S. 531 (1889); *Gilbert v. Soberg*, 86 Wis. 661 (1894); *Cincinnati Tribune v. Bruck*, 61 Ohio St. 489 (1899); *Degan v. Weeks*, 67 N. Y. App. Div. 410 (1901); *Gutzman v. Clancy*, 114 Wis. 589 (1902).

¹⁰⁴ *N. Y. Code Civ. Proc.*, Sec. 501; *Nat. F. Ins. Co. v. McKay*, 21 N. Y. 191 (1860); *Lipman v. Jackson A. Co.*, 128 N. Y. 58 (1891); *Hinckle v. Margerum*, 50 Ind. 240 (1875); *Babcock v. Maxwell*, 21 Mont. 507 (1898); *Scognamiglio v. Passarelli*, 157 App. Div. 428 (N. Y. 1913); *Sydney v. Muford P. Co.*, 214 Fed. 841 (Conn. 1914).

¹⁰⁵ *Byerly v. Humphry*, 95 N. C. 151 (1886).

¹⁰⁶ *Connecticut Practice Act*, Gen. Stat. Conn. (1902), Sec. 612; *New Jersey Practice Act of 1912*, Sec. 12; *Pennsylvania Practice Act of 1915*, P. L. 483, Sec. 14.

¹⁰⁷ *Harral v. Leverty*, 50 Conn. 46 (1882); *Downing v. Wilcox*, 84 Conn. 437 (1911).

¹⁰⁸ *Judicature Act of 1873* (36 and 37 Vict., Chap. 66), Sec. 24, cl. 3.

the court,¹⁰⁹ the defendant may set up by way of counter-claim "any right or claim whether such set-off or counter-claim sound in damages or not, and such set-off or counter-claim shall have the same effect as a cross-action, so as to enable the court to pronounce a final judgment in the same action, both on the original and on the cross-claim." But if in the opinion of the court such counter-claim cannot be conveniently disposed of in the pending action, or ought not to be allowed, permission to present it may be refused. Where the counter-claim raises a question between the plaintiff, the defendant and third persons, relating to the original subject of the cause, the latter may be added as parties.¹¹⁰ If the plaintiff's action is stayed, discontinued or dismissed, the counter-claim may nevertheless be proceeded with. And if the counter-claim is established, the court may adjudge to the defendant such relief as he may be entitled to on the merits.¹¹¹ It will be seen that this procedure encourages, although it does not compel, the settlement in one law suit of all outstanding controversies between the litigants. The counter-claim is practically a cross-action. It need not be in any way connected with the plaintiff's claim, or arise out of the same transaction; it need not be a claim of the same nature as the original action or even analogous to it. A claim founded on tort may be opposed to one founded on contract or *vice versa*. Even a cause of action which has accrued to the defendant after the date of the writ can be pleaded as a counter-claim.¹¹² "This court has determined," said Lord Esher, "that, where there is a counter-claim, in settling the rights of the parties, the claim and counter-claim are, for all purposes except execution, two independent actions" And Lord Justice Kay added: "All that those acts have done in

¹⁰⁹ Order 19, rule 3; order 21, rules 10 to 17.

¹¹⁰ *Edge v. Weigel*, 97 Law Times 447 (1907); *In re a Debtor*, 23 Times R. 169 (1907); *Times C. S. Co. v. Lowther* (1910), 2 K. B. 100.

¹¹¹ This may lead to a judgment for plaintiff with costs and a separate judgment for defendant with costs. *Provincial B. P. Co. v. Low Moor I. Co.* (1909), 2 K. B. 344; *Sharpe v. Haggith*, 106 Law Times 13 (1912). But in the case of a pure set-off judgment is entered for the balance alone.

¹¹² *Beddall v. Maitland* (1881), 17 Ch. D. 174; *Piercy v. Young* (1880), 15 Ch. D. 475; *Renton v. Neville* (1900), 2 Y. B. 181; *Re General Railway Syndicate* (1900), 1 Ch. D. 365. *The Cheapside* (1904), Probate D. 339; *Collison v. Warren* (1901), 1 Ch. D. 812. And see general note in *Annual Practice* (1914), 366 *et seq.*

respect of a counter-claim is to allow a cross-action to be brought and tried at the same time as the original action. This is for the general convenience and to prevent the necessity for trying the actions separately, with all the attendant cost of doing so."¹¹³

Thus, in the course of something more than two hundred years, the policy of the law as to cross-demands has undergone a radical change. The theory that every controversy can by the mechanical processes of formal logic be reduced to a single question of law or fact has fallen into discredit with the scholastic learning that gave it sustenance in the law courts. Life is too complicated, time too precious to the modern man to permit him forever tamely to submit to the dissection of his disputes into a series of modified ordeals. Irritation at the obvious injustice of excluding set-offs against plaintiffs of doubtful financial ability; the waste of time and unnecessary expenditures involved in two or more suits were all factors in bringing about the eighteenth century changes. The reforms of the nineteenth century were accomplished by men who, strongly impressed with the superiority of equity over common law procedure, worked out this problem through the medium of the cross-bill. In England the practice of settling all controversies between the parties in a single action has been carried farther than in the United States and for good reasons; the huge congestion of business, commercial and legal, in the centre of a world empire called for the strictest economy of time and efficiency of methods in procedure. This in a measure has been accomplished by abandoning common law pleading, placing the preparation of the cause for trial under the supervision of a master, limiting the right of trial by jury and empowering the court to order different questions of fact to be tried by different modes of trial or that one or more questions of fact be tried before the others.¹¹⁴ A system like this lends itself easily to the disposal of incongruous counter-claims.¹¹⁵

¹¹³ *Stumore v. Campbell* (1892), 1 Q. B. 314.

¹¹⁴ See rules of Supreme Court, order 36, rule 8. See also "Studies in English Procedure," by Samuel Rosenbaum, Esq., 63 *UNIV. OF PENNA. L. REV.* 273.

¹¹⁵ In *Lord Kinnaid v. Field* (1905), 2 Ch. D. 361, the plaintiffs brought an action in the Chancery Division of the High Court for specific perform-

Such revolutionary short cuts to speedy justice are clearly impracticable, if not impossible, in the United States, as long as the unlimited right of trial by jury in civil actions, as standardized in the eighteenth century, is jealously guarded by state and federal constitutions, by judicial decisions, and public approbation. This is the stone wall against which law reform beats its head in vain, and will continue to do so until the weakness as well as the strength of this venerable institution is better understood by the lay community. The avoidance of circuitry of action, of multiplicity of suits, of waste of public and private time, is a programme to which all would heartily subscribe in principle, but the application of a principle to practice is a slower matter; old prejudices must be overcome, old habits outgrown, new conditions realized. In fact, when this subject comes to be studied centuries from now, as we study Roman law, it may be decided that we moved with appreciable rapidity in the development of a doctrine repugnant to the fundamental ideas of primitive procedure.

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ance of a contract for an injunction and damages. The defendant counter-claimed for libel, arrears of salary, specific performance and other matters and then applied for a transfer of the case to the King's Bench Division for a jury trial. This was refused but the court said that if the defendant severed the issues and asked that the issues relating to defamation alone should be tried before a jury they would accede to the application. The defendant, however, did not apply.